IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 1789 of 2002.

Reserved on: 15.06.2007.

Decided on: 23.07.2007.

Shri B.M. Sharma and Others. … … Petitioners.

Versus

Chief Settlement Commissioner and Others. … … Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the Petitioners:	**Mr. D. Dadwal, Advocates.**
For Respondents No.1 to 3:	**Mr. M.S. Chandel, Advocate General with Ms. Meenakshi Sharma, Deputy Advocate General.**
For Respondent No.4:	**Mr. Ravinder Thakur, Advocate.**
For Respondents No.5 & 6:	**Mr. R.K. Bawa, Senior Advocate with Mr. Inderjit Singh, Advocate.**
For the Respondent No.7:	**Mr. Shrawan Dogra, Advocate.**

Rajiv Sharma, Judge:

The brief facts necessary for the adjudication of this petition are that the predecessor-in-interest of the petitioners, Shri Roop Lal Sharma had purchased the eastern half share a of four storeyed building situated in Lower Bazar, Shimla, H.P. described and recorded in the municipal record as shop No.130, 130/1 and 131. Late Shri

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Whether reporters of local papers may be allowed to see the judgment? yes.

Roop Lal Sharma had purchased this property at a public auction held on 7.4.1954. The sale certificate as per the provisions of Evacuee Interest (Separation) Act, 1951 was issued by the Estate Officer, Jalandhar. The property was sold for a sum of Rs.19,600/-. A sum of Rs. 4,900/- was deposited at the fall of the hammer being 1/4th of the sale proceeds and the remaining amount of Rs.14,700/- was deposited on 17.4.1954. Shri Roop Lal Sharma had been depositing the requisite taxes etc. with the Municipal Committee, Shimla. A notice was issued to the petitioners by the Naib Tehsildar (Sales)-cum-Managing Officer, Shimla on 16.9.2000. The reply was filed to the show cause notice dated 16.9.2000. The case was placed before the Settlement Commissioner (Re-habilitation), Shimla. The respondent No.6 had declared the property which was purchased by the Predecessor-in-interest of the petitioners as Sunni Wakf property vide notification dated 9.3.2002. The respondent No.3 had effected mutation in the revenue records treating the Wakf Board (respondent No.6) as the owner of the property. The Board had also preferred an appeal before the Chief Settlement Commissioner (Re-habilitation), Shimla, whereby their application under Order 1 Rule 10 of the Code of Civil Procedure for impleading as party-respondent was rejected in case No. Revenue(C)E(2)-14/2000. The respondents No.1 to 4 had filed separate replies as also respondents No. 5 and 6.

Mr. Dushyant Dadwal had strenuously argued that the petitioners are the absolute owners of the property after the same was purchased by their Predecessor-in-interest at a public auction held on 7.4.1954 and they are in peaceful possession of the same. He further contended that the notice issued by respondent No.3 on 16th September, 2000 is without jurisdiction. He also contended that the notification dated 9.3.2002 is illegal, ultra-vires and void. The learned

Advocate General had supported the orders passed by the competent authorities. Mr. R.K. Bawa, Senior Advocate with Mr. Inderjit Singh, Advocate had strenuously argued that the property in dispute is a Wakf property and the same has been rightly notified on 9th March, 2002 as Wakf property and the revenue entries to this effect have been made in the record of rights.

I have heard the parties and also gone through the entire record carefully.

The position which emerges from the aforesaid facts is that the petitioners' Predecessor-in-interest had purchased the land at a public auction on 7th April, 1954. The sale certificate as per the provisions of Evacuee Interest (Separation) Act, 1951 was issued in favour of Shri Roop Lal Sharma. He had been paying all the taxes/fees to the Municipal Committee and after his death, the same are being paid by the petitioners. The notice has been issued by the respondent No.3 on 16.9.2000 and the Settlement Commissioner (Re-habilitation) had come to the conclusion in his order dated 28th September, 2002 that the ownership of the petitioners was established and the notification issued was without giving opportunity of being heard, seems to be illegal. The notification has been issued, which appeared in the gazette of India dated March 9, 2002 whereby the properties owned by the petitioners have been declared as Sunni Wakf property.

Before the rival submissions of the parties are discussed, it will be apt to take note of the provisions of the Administration of Evacuee Property Act, 1950, The Evacuee Interest (Separation) Act, 1951, The Wakf Act, 1954 and the Wakf Act, 1995.

"Evacuee property" has been defined under Section 2(f) of the Administration of Evacuee Property Act, 1950, to mean any property of an evacuee (whether held by him as owner or as a trustee or as a

beneficiary or as a tenant or in any other capacity) and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode or transfer which is not effective by reasons of the provisions contained in Section 40. Section 7 of the Administration of the Evacuee Property Act, 1950 provides that where the custodian is of the opinion that any property is evacuee property within the meaning of this Act, he may after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property.

Section 8 provides that any property declared to be evacuee property under Section 7 shall be deemed to have vested in the Custodian for the State.

Sub-section (d) of Section 2 of the Evacuee Interest (Separation) Act, 1951 defines the 'composite property' to mean any property which or any property in which an interest has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act, 1950. Chapter II of the Act deals with Separation of Evacuee Interest in composite property.

Sub-Section (h) of Section 3 of the Wakf Act, 1954 defines 'person interested in a wakf' means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes, –

(i) any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah etc.

(ii) the wakif and any descendant of the wakif and mutawalli.

Section 3(l) defines ‘wakf’ to mean the permanent dedication by a person professing Islam [or any other person] of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes –

(i) a wakf user (but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;)

Chapter II of the Wakf Act, 1954 deals with Survey of Wakfs. Section 4 stipulates preliminary survey of wakfs and Section 5 deals with publication of list of wakfs. Section provides that if any question arises, whether a particular property specified as a wakf property in a list wakfs published under sub-section (2) of Section 5 is a Wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final.

Section 6-A deals with power of Tribunal to determine disputes regarding wakfs. Section 27 provides that the Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni Wakf or a Shia wakf, it may, after making such inquiry as it may deem fit, decide the question.

The Wakf Act, 1954 was repelled by Wakf Act, 1995. Section 3(k) defines the expression, ‘person interested in a wakf’ to mean any person who is entitled to receive any pecuniary or other benefit from the wakf. Section 3(r) defines the ‘wakf’ to mean the permanent

dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes –

(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser.

Chapter II of the Wakf Act, 1995 deals with Survey of Wakfs. Section 4 provides the method of doing survey of wakfs and publication of lists of wakfs is to be done under Section 5. The disputes regarding wakfs are to be resolved as per Section 6. Section 7 empowers the Tribunal to determine the disputes regarding wakfs. Section 27 of the Act empowers the Board to delegate its powers. Section 40 deals with the decision if a property is wakf property. Section 40 reads as under:-

> **"40. Decision if a property is wakf property. – (1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf of a Shia wakf it may, after making such inquiry as it may deem fit, decide the question.**
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> **(2) The decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal be final.**
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> **(3) Where the Board has any reason to believe that any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 or under the Societies Registration Act, 1860 or under any other Act, is wakf property, the Board may notwithstanding anything contained in such Act hold an inquiry in regard to such property and if after such inquiry the Board is satisfied that such property is wakf property,**

call upon the trust or society, as the case may be, either to register such property under this Act as wakf property or show cause why such property should not be so registered:

Provided that in all such cases, notice of the action proposed to be taken under this sub-section shall be given to the authority by whom the trust or society had been registered.

(4) The Board shall after duly considering such course as may be shown in pursuance of notice issued under sub-section (3) pass such order as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a Tribunal."

Section 83 provides for constitution of Tribunals etc. and the same is reproduced as under:

"83. Constitution of Tribunals etc. – (1) The State Government shall by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the

mutawalli or any one of the mutawalli or the wakf factually and voluntarily resides, carries on business or personally works for gain, and where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter.

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction and , on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred , except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of one person who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, and the appointment of every such person may be made either by name or by designation.

(5) The Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil Court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908.

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for the examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."

Primarily, four issues are required to be decided by this Court:-

(1) Whether the show cause notice issued to the petitioners by respondent No.3 on 16th September, 2000 is without jurisdiction?

(2) Whether the notification, i.e. Annexure P-N, dated March 9, 2002 is in conformity with the Wakf Act, 1995 or not?

(3) Whether the petition is maintainable in this Court despite the remedy available to the petitioners under Section 83 of the Wakf Act, 1995?

(4) Whether disputed questions of fact are involved in the petition necessitating the petitioners to be relegated to avail the remedy of civil suit?

The petitioners have been issued notice dated 16.9.2000 by the respondent No.3 on the basis of Khasra Paimaish whereby property comprised in Khasra No.411 measuring 1395 square feet has been shown to be owned by “Sarkar Dalut Mandar” and in possession of one Gainda Mall son of Sarnu Mal ½ share and Khan Sahib Fakeeru Deen ½ share, as per note dated 22.3.1951 in this revenue record, shop No.130, 131/1, 131/2 and 132, Lower Bazar and this property has been shown as Muslim property under the possession of a Custodian. The petitioners had filed a detailed reply to the show cause notice on 28.9.2000. The Settlement Commissioner (Re-habilitation) had passed the order on 11th December, 2000 directing the petitioners to show as to why the property should not be deemed to be Custodian property and put to sale. The Settlement Commissioner (Re-habilitation), as is evident from the order dated 28th September, 2002 was satisfied that the ownership of the petitioners was established and the notification issued without giving opportunity of being heard to them was illegal. The notice was issued to the Central Government by the Settlement Commissioner (Re-habilitation). The Evacuee property has been defined under the Administration of Evacuee Property Act, 1950 and as per Section 7 of the Act where the Custodian is of the opinion that any property is evacuee property within the meaning of the Act, he may after causing notice thereof to be given in such a manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring such property to be evacuee property, and thereafter the Custodian from time to time is required to notify, either by publication in the Official Gazette or in such other manner as may be prescribed, all properties declared by him to be evacuee properties under sub-section (1). The respondents No.1 to 4 have not placed on record any

notification suggesting that the property in question was evacuee property as per Section 7 of the Administration of Evacuee Property Act, 1950. The respondent No.3 had not applied his mind to the relevant material before issuing the notice.

The Apex Court has held in ***Nasir Ahmed v. Assistant Custodian General, Evacuee Property, U.P., Lucknow and another, AIR 1981 SC 1157*** that the authority concerned has to apply its mind to the relevant material before issuing the notice. Their Lordships have held as under:-

> **"What is said in the preceding paragraph makes it plain that the authority concerned did not apply his mind to the relevant material before issuing the notice. The same thing is apparent from another fact. It has been stated that on November 29, 1952 the Deputy Custodian, Deoria, dropped the proceeding seeking to declare the appellant an intending evacuee and that on the same day he directed the initiation of proceedings under Section 7. Section 7 requires the Custodian to form an opinion that the property in question is evacuee property within the meaning of the Act before any action under that section is taken. Also, under Rule 6 the Custodian has to be satisfied from information in his possession or otherwise that the property is prima facie evacuee property before a notice is issued. On November 29, 1952 no evidence was found to support a declaration that the appellant was an intending evacuee. There is no material on record to suggest that on that very day the authority had before him any evidence to justify the initiation of a proceeding to declare the appellant an evacuee and his property as evacuee property. The notice under Section 7 thus appears to have been issued without any basis. The Assistant Custodian General who found no merit in the revisional application preferred by the appellant overlooked these aspects of the case. We are therefore unable to agree**

with the High Court that the Assistant Custodian General's order did not suffer from any error."

Since the notice itself was cryptic and on the basis of the reply furnished by the petitioners, the Settlement Commissioner (Re-habilitation) had come to the just conclusion that the petitioners were owners of the land in question as per order dated 28.9.2002. Thus the notice dated 16.9.2000 is held to be without jurisdiction.

The second question which needs consideration now is whether the notification issued and published in the Government of India Gazette vide Annexure P-N is in accordance with law or not. The Wakf Act, 1995 has defined the 'Wakf' to mean the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim Law as pious, religious or charitable. It is the duty cast upon the State Government under Section 4 of the Act to appoint a Survey Commissioner of Wakfs to make a survey of wakfs existing in the State at the date of the commencement of the Act. Similar was the language employed in Section 4 of the Wakf Act, 1954. The State Government under Section 5 of the old and new Act had to publish the list in the official Gazette. If there is any dispute whether a particular property specified as wakf property in the list of wakfs is a wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final.

The Hon'ble Supreme Court has explained the expression or "any person interested therein" in ***The Board of Muslim Wakfs, Rajasthan v. Radha Kishan and others, AIR 1979 SC 289*** as under:-

"The answer to these questions must turn on the true meaning and construction of the word 'therein' in the expression 'any person interested therein' appearing in sub-s. (1) of S.6. In order to understand the meaning of the word 'therein' in our view, it is necessary to refer to the preceding words 'the Board or the mutawalli of the wakf'. The word 'therein' must necessarily refer to the 'wakf' which immediately precedes it. It cannot refer to the 'wakf property'. Sub-sec. (1) of S. 6 enumerates the persons who can file suits and also the questions in respect of which such suits can be filed. In enumerating the person who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and 'any person interested therein', thereby necessarily meaning any person interested in the wakf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore, be logical and reasonable to infer that its provisions empower only those who are interested in the wakf, to institute suits.

In dealing with the question, the High Court observes:

"In our opinion, the words 'any person interested therein" appearing in sub-sec. (1) of S. 6 mean no more than a person interested in a wakf as defined in clause (h) of S. 3 of the Act. …..

It is urged by learned counsel for the petitioners that the legislature has not used in S. 6 (1) the words "any person interested in a wakf" and, therefore, this meaning should not be given to the words "any person interested therein". This argument is not tenable because the words "any person interested therein" appear soon after "the mutawalli of the wakf" and therefore the word 'therein' has been used to avoid repetition of the words "in the wakf" and not to extend the scope of the section to persons who fall outside the

scope of the words "person interested in the wakf". The purpose of Section 6 is to confine the dispute between the wakf Board, the mutawalli and a person interested in the wakf."

That, in our opinion, is the right construction.

We are fortified in that view by the decision of this Court in Sirajul Haq Khan v. The Sunni Central Board of Wakf, U.P. 1959 SCR 1287: (AIR 1959 SC 198). While construing S. 5(2) of the United Provinces Muslims Wakf Act, 1936, this Court interpreted the expression "any person interested in a wakf" as meaning 'any person interested in what is held to be a wakf', that is, in the dedication of a property for a pious, religious or charitable purpose. It will be noticed that sub-s. (1) of S. 6 of the Act is based on sub-s. (2) of S. 5 of the United Provinces Muslims Wakf Act, 1936, which runs thus:

"The mutawalli of a wakf or any person interested in a wakf or a Central Board may bring a suit in a civil court of competent jurisdiction for a declaration that any transaction held by the Commissioner of Wakfs to be a wakf is not a wakf, or any transaction held or assumed by him not to be a wakf, or that a wakf held by him to pertain to a particular sect does not belong to that sect, or that any wakf reported by such Commissioner as being subject to the provisions of this Act is exempted under S. 2, or that any wakf held by him to be so exempted is subject to this Act."

The proviso to that section prescribed the period of one year's limitation, as here, to a suit by a mutawalli or a person interested in the wakf.

The two provisions are practically similar in content except that the language of the main enacting part has been altered in sub-s. (1) of S. 6 of the present Act and put in a proper form. In redrafting the section, the sequence of the different clauses has been changed,

therefore, for the expression "any person interested in a wakf" the legislature had to use the exception "any person interested therein." The word 'therein' appearing in sub-s. (1) of S. 6 must, therefore, mean 'any person interested in a wakf' as defined in S. 3 (h). The object of sub-s. (1) of S. 6 is to narrow down the dispute between the Board of Wakfs, the mutawalli and the person interested in the wakf, as defined in S. 3 (h)."

The respondents No.6 to 7 have not placed on record any material that the property in dispute was ever included in the list of Sunni Wakf as stated in the reply. Though Mr. Bawa has drawn the attention of the Court to Annexure R-5/B that one Shri Fakru Deen had made a will on 25.11.1945 in favour of the Maszid. If that was so, the same was required to be included in the list prepared in accordance with Section 4 of the Wakf Act, 1950.

Mr. Dadwal had also argued that Annexure P-N had been issued without issuing any show cause notice to the petitioners. Admittedly, no notice had been issued to the petitioners before the issuance of Annexure P-N whereby the property of the petitioners has been shown as wakf property and the revenue entries have been changed in favour of respondents No.5 and 6. Section 40 of the Wakf Act, 1950 provides for holding an inquiry to ascertain whether any property is a wakf property or not. The holding of inquiry as per the section is proposed so that the persons likely to be affected are heard before the order is passed by the Board. The issuance of Gazette notification on 9th March, 2002 had civil consequences qua the petitioners who have been divested of their ownership of the land without hearing them. The petitioners were required to be heard before the issuance of Annexure P-N.

The Apex Court had considered the exercise of suo motu power under Section 27 without issuing show cause notice in ***M.P. Wakf Board Versus Subhan Shah (dead) by LRs. And others, (2006) 10 SCC 696*** as under:-

> **"We are not unmindful of the fact that the Board itself could have initiated proceedings in terms of Section 27 of the 1954 Act but then no suo motu proceeding was initiated by it. No notice in this behalf has been issued.**
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> **In D.N. Roy and S.K. Banerjee v. State of Bihar the law is stated in the following terms: (SCC p.123, para 7)**
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> > **"7. it is true that the order in question also refers to 'all other powers enabling in this behalf'. But in its return to the writ petition the Central Government did not plead that the impugned order was passed in exercise of its suo motu powers. We agree that if the exercise of a power can be traced to an existing power even though that power was not purported to have been exercised, under certain circumstances, the exercise of the power can be upheld on the strength of an undisclosed but undoubted power. But in this case the difficulty is that at no stage the Central Government intimated to the appellant that it was exercising its suo motu power. At all stages it purported to act under Rules 54 and 55 of the Mineral Concession Rules, 1960. If the Central Government wanted to exercise its suo motu power it should have intimated that fact as well as the grounds on which it proposed to exercise that power, to the appellant and given him an opportunity to show cause against the exercise of suo motu power as well as against the grounds on which it wanted to exercise its power. Quite clearly the Central Government had not**

given him that opportunity. The High Court thought that as the Central Government had not only intimated to the appellant the grounds mentioned in the application made by the 5th respondent but also the comments of the State Government, the appellant had adequate opportunity to put forward his case. This conclusion in our judgment is untenable. At no stage the appellant was informed that the Central Government proposed to exercise its suo motu power and asked him to show cause against the exercise of such a power. Failure of the Central Government to do so, in our opinion, vitiates the impugned order."

If the proceeding was initiated by the Board for which it had no jurisdiction whatsoever, its order would be coram non judice. ***[See Kiran Singh v. Chaman Paswan and MD, Army Welfare Housing Organization v. Sumangal Services (P) Ltd.]*** **Unfortunately, the attention of the Tribunal or the High Court was not drawn to this aspect of the matter."**

A Division Bench of Mysore High Court in ***Abdul Rab Shah Khadri v. The Court of the District Judge, Mandya and others, AIR 1972 Mysore 96*** has held that inquiry under Section 27(1) of the Wakf Act, 1954 necessarily involved the issuance of notice to the petitioner to substantiate his claim. Their Lordships have held as under:-

"In the case on hand, the application under Section 25 of the Act was received sometime prior to 22-10-1969 on which date the certificate of registration was issued under Section 27 of the Act, and it is not disputed that the Board knew that the petitioner was in possession of the land in question and had asserted his own title to it. When once the Board came to know that the property in question was in possession of the petitioner and he had lodged his claim

thereto, the Board should have held an enquiry in to the question whether the property was wakf property or not as required by Section 27 (1) of the Act. Such enquiry necessarily involved the issue of notice to the petitioner to substantiate his claim. Admittedly, no such enquiry was held and no notice was issued to the petitioner to establish his claim before taking a decision under sub-section (1) of S. 27 of the Act. It is to be further seen that the Board Committed a further mistake in sending a requisition to the Deputy Commissioner for taking action under Section 36-B of the Act. The Board can send such a requisition only when it is satisfied after making an enquiry, in the prescribed manner, that any immovable property of a wakf entered as such in the register of wakfs under Section 27 of the "Act, had been transferred without the previous sanction of the Board in contravention of the provisions of Sec. 36-A of the Act. As already observed, the registration of the property in question under Section 26 of the Act pursuant to the issue of certificate issued under Section 27 of the Act itself was not in order. Even if the property was considered as wakf property, action under Section 36-B could be taken only when the Board was satisfied that there had been contravention of the provisions of Section 36-A, which prohibited the transfer of any immovable property of a wakf by way of sale, gift, mortgage or exchange or lease for the periods specified in that section without the previous sanction of the Board. In this case, we do not have any material to come to the conclusion that Sec. 36-A of the Act had been contravened at all. Hence, the action of the Board in sending the requisition to the Deputy Commissioner under sub-section (1) of S. 36-B of the Act was wholly without jurisdiction. It, therefore, follows that the action of the Deputy Commissioner in passing an order under sub-section (2) of S. 36-B of the Act calling upon the petitioner to deliver possession of the property to the Board within a specified period was also one without jurisdiction. The learned District Judge who heard the appeal preferred by the petitioner under sub-section (4) of

S. 36-B of the Act, did not examine the question in the light of the provisions referred to above. He proceeded to dispose of the case on the basis that on the issue of a certificate of registration by the Board, the matter was beyond question, and therefore, the actions taken by the Board under sub-section (1) of S. 36-B of the Act and by the Deputy Commissioner under sub section (2) of S. 36-B of the Act, were in order. We are, therefore, of the opinion that the order of the District Judge, which is impugned in this petition is again an erroneous one."

The Single Judge of Madras High Court in ***Abdul Kareem died and others v. The Special Officer for Wakfs, Madras and others, AIR 1972 Madras 8*** has held that publication in the gazette that a particular property is a wakf property without giving notice to the person affected is improper and offends the principles of natural justice in depriving a person of his property right without notice. His Lordship has held as under:-

"The learned counsel for the appellant contends that the publication in the Gazette was made without making the requisite enquiry and without notice to him. There is considerable force in the contention of the learned counsel. The learned Subordinate Judge, in paragraph 7, observed that no witnesses were examined by the Assistant Commissioner of the Wakf Board. It is further seen that the particulars entered (in the?) publication in the Gazette are vague inasmuch as under Clause No.1 the name of the Wakf alone is given as Pudupalayam Burial ground Wakf, without specifying its exact location. Under the head "Name of the village" the entry is Manjakuppam; and in column No.3 it is shown "pious religious and charitable for the support of the burial ground" Except that the place of the wakf is given as South Arcot District, there is no other indication to identify the property. There is an annexure to the notification and entry No.11 of the annexure shows that

no notice was served on the Mutavalli. The actual entry No.11 in the annexure runs: "The Mutavalli is absent at Pondicherry and his address is not known". It is, therefore, clear that no attempt was made to serve the Mutavalli. I am therefore satisfied that the complaint of the appellant that he has not been served with notice of the enquiry prior to the making of the report has been made out.

In a similar situation Alagiriswami, J. in W.P. No. 1142 of 1966 (Mad) held (Syed Hussain v. State Wakf Board by Secretary):

"The publication in the Gazette is hardly a proper substitute for notice to the person affected. Not everybody is expected to look into the gazette every day at the risk of his losing his property rights. Publication in the gazette must be accompanied by notice to the persons affected. Otherwise there will be absence of minimum requirements of natural justice before a person is deprived of his property rights."

The said judgment was confirmed in appeal. Following the above decision, I allow the appeal and set aside the decrees of the courts below. It is open to the first defendant to take proper steps after issue of the requisite notice to the muthavalli and making an enquiry to notify the same as a wakf if in his opinion it is found to be wakf property. The Madras Wakf Board is impleaded as the first respondent in the second appeal. It is unfortunate that no one has represented the Wakf Board. There will be no order as to costs. No leave."

This Court is of the opinion that issuance of Annexure P-N is *void ab initio* since no notice was issued to the petitioners before its publication.

Mr. Bawa, Senior Advocate had strenuously argued that when the petitioners have a remedy available under Section 83 of the Wakf

Act, 1995, the Court should not hear the present petition. The plea raised by Mr. Bawa is untenable, firstly on the ground that the notice dated 16.9.2000 issued to the petitioners on 16.9.2000 is without jurisdiction, and secondly, the notification issued vide Annexure P-N is also *void ab initio* since the same has been issued without serving any show cause notice to the petitioners.

The petition was filed in this Court on 30th September, 2002. It was admitted on 31.12.2002 and thereafter it was pending for hearing. The petitioners at this belated stage cannot be relegated to file a civil suit.

The Apex Court has held in ***Custodian, Evacuee Property, Punjab and others v. Jafran Begum, AIR 1968 SC 169*** that under Section 46 the jurisdiction of the Civil Court is barred, but the jurisdiction of the High Court under Article 226 of Constitution of India is not barred. Their Lordships have held as under:-

> **"It may be added that the only question to be decided under S.7 is whether the property is evacuee property or not and the jurisdiction of the Custodian to decide this question does not depend upon any finding on a collateral fact. Therefore, there is no scope for the application of that line of cases where it has been held that where the jurisdiction of a tribunal of limited jurisdiction depends upon first finding certain state of facts, it cannot give itself jurisdiction on a wrong finding of that state of fact. Here under S.7 the Custodian has to decide whether certain property is or is not evacuee property and his jurisdiction does not depend upon any collateral fact being decided as a condition precedent to his assuming jurisdiction. In these circumstances, S. 46 is a complete bar to the jurisdiction of civil or revenue courts in any matter which can be decided under S. 7. This conclusion is reinforced by the provision contained in S. 4 (1) of the Act which provides that the Act**

overrides other laws and would thus override S. 9 of the Code of Civil Procedure on a combined reading of Ss. 4, 28 and 46. But as we have said already, S. 46 or S. 28 cannot bar the jurisdiction of the High Court under Art. 226 of the Constitution, for that is a power conferred on the High Court under the Constitution."

The Hon'ble Supreme Court has held in ***Baburam Vs. Zila Parishad, AIR 1969 Supreme Court 556*** that existence of an alternative remedy is no bar to writ petition where it is alleged that the Tribunal acted under provisions of law which were ultra vires or where it is alleged that it acted in violation of principle of natural justice. The Hon'ble Supreme Court has opined as under:

"It is a well established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed Vs. Municipal Board, Kairana, 1950 SCR 566= (AIR 1950 SC 163), "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefore. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In State of Uttar Pradesh Vs. Mohammad Nooh, 1958 SCR 595, 606= (AIR

1958 SC 86, 93), S.R. Dass, C.J; speaking for the Court, observed:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will be only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute, (Halsbury's Laws of England, 3rd Edn; Vol.II, p. 130 and the cases citied there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the Kind Vs. Postmaster General; Ex parte Car-michael, 1928-1 KB 291 (E), a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of Rex v. Wandsworth Justices; Ex parte Read, 1942-1 KB 281 (F) is an authority in point. In that case a man had been convicted in a court summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to

the High Court for an order of certiorari to remove and quash the conviction.

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course."

The Hon'ble Supreme Court in ***Hirday Narain Vs. I.T.O. Bareily, 1970 (2) SCC 355*** has held that the High Court would not be justified in dismissing as not maintainable the petition which was entertained and was heard on merits though the petitioner could file revision before the Commissioner of Income Tax.

"An order under section 35 of the Income Tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

> **The High Court observed that under Section 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, that vie\\' is in our Judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of 'enforcement of a right-pubic or private-of a citizen"**

Similarly it has been held in **Durlabhkumar *V. Distt. Judge, Indore, AIR 1973 Madhya Pradesh 175*** that if a petition is heard on merit, the same cannot be rejected on the ground that the statutory remedy was not available. The Hon'ble Division Bench has opined as under:

> **"It was contended that as the alternative remedy of appeal, which was available to the petitioner, was not availed by him, relief under Article 226 of the Constitution could not be granted. In AIR 1971 SC 33, this question was considered by the Supreme Court and it was observed that-**
>
> **An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his**

petition Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on merit."

In view of the matter, it would not be right to reject this petition at this stage. Shri Kohli, apearing for the respondent-Corporation, contended that in the Supreme Court case referred to above on the date, on which the writ petition was filed in the High Court a revision could be filed, and as the High Court admitted the petition the Supreme Court felt that thereafter the petition could not be dismissed on that ground alone. But according to the learned counsel, in the present case the time for appeal had already run out and, therefore, the alternative remedy having not been availed of, this petition could not be entertained. It is no doubt true that the time provided for an appeal had run out when this petition was fi1ed. But if the petitioner had so chosen, he could have preferred an appeal and sought condonation. In that view of the matter, the principles laid down by the Supreme Court will fully apply to the present case also, and no distinction can be drawn only on that ground. It appears that what the Supreme Court felt was that if at the time of motion hearing the petition had not been entertained, the petitioner could have sought the alternative remedy but that not having been done, after lapse of long time it would not be fit to refuse to grant relief as now it would not be possible for the petitioner to avail of the alternative remedy also. Apart from that, the question involved in the present case is about the jurisdiction of the District Judge and by

refusing to investigate into the objections raised by the petitioner the District Judge had refused to exercise jurisdiction in him by law. Consequently this is a ground on which a petition under Article 226 or even under Art. 227 of the Constitution would be maintainable. Consequently the petition cannot also be thrown out on the objection of maintainability.

In ***Malkhan Singh Vs. Union of India, 1981 (2) Labour Law Journal – 174*** it has been held by the Hon'ble High Court of Judicature, Delhi that if the petition is admitted it should not be dismissed for the reasons that alternative remedy is available more particularly when the petition had been pending for two years. Hon'ble High Court of Judicature, Delhi has opined as under:

"**Furthermore, "there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy": see State of U.P. V. Mohammad Nooh. (AIR 1958 SC.86). The existence of an alternative remedy is merely a factor to be taken into consideration and not a bar to relief. When there is "manifest error" or a "patent illegality" it is the duty of the High Court to interfere: see A.V. Venketeswaran, Collector of Customs, Bombay V. Ramchand Sobhraj Wadhwani and another, AIR 1961 SC 1506 and Hindustan Aluminum Corporation Ltd. V. Controller of Aluminum and others. ILR (1976) 1 Del. 336. Especially when quick relief is necessary; see Calcutta Companies District 1, Calculata and another AIR 1961 SC 372. And after admitting a petition for hearing on merits, it is not generally fair to dismiss it on this somewhat technical ground: see C.A. Abraham v. Income Tax Officer, Kottayam and another AIR 1961 SC 609 L. Hirday Narain v. Income Tax Officer, Bareilly, AIR 1971 SC 33 and the decision of a Division Bench of this Court in STR No.3 of 1973 entitled M/s Goodwill India Ltd. V. The State, decided on 20th April, 1979.**

Now, applying these various propositions, how do the cases of the petitioners stand; At preliminary hearing, notice was issued to the respondents to show cause "why rule nisi be not issued". One of the preliminary objections raised in answer was that the petitioners had an equally efficacious alternative remedy open to them, under the Industrial Disputes Act and, hence, were not entitled to invoke the extraordinary jurisdiction of this Court under Article 226. Dispute that that objection, the petitions were admitted. It is reasonable to conclude that the object, did not find favour with the admitting Bench. To allow this objection now after the petitions have been pending for two years, would clearly be most unjust. It may have been fair to turn away the petitioners at the threshold, but is different at this stage."

The Hon'ble Supreme Court in ***Assam Sillimanite Ltd. V. Union of India (1990) 3 SCC 182*** has held that pendency of the petition for a considerable long period is also one of the exceptions for not directing the parties to avail of the alternative remedy. The Hon'ble Supreme Court has held as under:

"The next question is regarding the relief to be granted to the petitioner. Shri Datar submits that in the writ petition the only prayer made by the petitioners is for the quashing of the order dated December 7, 1972 and that no further claim has been made in the writ petition. He submits that if the petitioners are aggrieved because of the premature termination of the leases, it is open to them to file a suit or take other appropriate remedies for obtaining compensation in respect of the unlawful termination. We do not think that this is a fair course to be adopted in this case. The writ petition was filed by the petitioner company as early as in February 1973 and has been pending in this Court for about 17 years. It is true that the petitioner could have filed a suit

for the same purpose with a prayer for additional relief by way of compensation or damages. But we do not think that it should now be asked to go back to file a suit for compensation or damages which may be barred by limitation. After the lapse of such a long time, in our opinion, the proper course is to adopt some method for deciding the quantum of relief that could be granted to the petitioner by way of compensation and damages, which can at once be simple and expeditious and which will avoid further unnecessary litigation. We think that the request of the learned counsel that the matter may be referred to arbitration is a fair one and indeed this course is also not seriously resisted by the respondents. The short question that remains to be decided is whether the petitioners have suffered any damages as a result of the premature termination of the three leases in their favour either in the shape of loss of profits for the unexpired periods of the leases or in any other material respect. We, however, direct that, having regard to the circumstances of the case, the compensation/damages should be restricted to a period of five years from the date of termination of the leases or up to the date of expiry of the original lease deeds referred to above whichever is less and not for the entire unexpired period of all the leases. We refer this issue to arbitration."

The Hon'ble Supreme Court in ***S.J.S. Business Enterprises (P) Ltd. V. State of Bihar, (2004) 7 Supreme Court Cases 166*** has held that existence of alternative remedy does not impinge on the jurisdiction of the High Court to hear the matter if it is otherwise possible. Hon'ble Supreme Court has opined as under:

"**The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226. But the existence of such**

remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If, however, a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. The rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another court. But even when an alternative remedy has been availed of by a party but not pursued, the party could prosecute proceedings under Article 226 for the same relief. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits."

The Hon'ble Supreme Court has held in ***Durga Enterprises (P) Ltd. And another V. Principal Secretary, Govt. of H.P. and others, (2004) 13 Supreme Court Cases 665*** that High Court having entertained the writ petition in which the pleadings were also complete ought to have decided the case on merits instead of relegating the parties to a civil suit. Hon'ble Supreme Court has held as under:

"By the impugned order the writ petition, which was pending for a long period of thirteen years, has been summarily dismissed on the ground that there is remedy of civil suit. The dispute between the parties was concerning exercise of the respondents' alleged right of re-entry on the disputed property in accordance with sub-rules (2) and (3) of Rule 5 of the Land Acquisition (Companies) Rules, 1963. The aforesaid Rules contain a mechanism for adjudication of a dispute

relating to the alleged breach of terms of the agreement and the manner in which it is to be resolved.

The High Court, having entertained the writ petition, in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit.

We, therefore, set aside the impugned order of the High Court and remit the matter to it for taking a decision on merits, after hearing the parties, within the earliest possible period."

The Karnataka High Court has held in ***Shah Mansur Peer Dargah and another etc. v. State of Karnataka and others, AIR 1980 Karnataka 118*** that the decision under Section 27(1) of the Wakf Act, 1954 can be challenged under Article 226 of the Constitution of India. His Lordship has held as under:-

"Earlier I have referred to the nature of the application made by respondent No.3 and also the nature of the order made by the Board. The fact that the decision of the Board, assuming that the same has been made exclusively under sub-section (1) of S. 27 of the Act, can be challenged before a Civil Court by an aggrieved person, does not necessarily exclude the jurisdiction of this court to examine its validity under Article 226 of the Constitution. Secondly, the questions raised in these petitions, do not involve a detailed investigation into the nature of the rights, recording of evidence, consideration of such e evidence and a decision thereon by this court. Lastly, the facts necessary to determine the questions that are urged for the petitioners are not even disputed by respondents 2 and 3. In these circumstances, this court will not be justified in refusing to examine the case of the petitioners and drive them to civil suit. For these reasons, I reject this contention of Sri Murlidhar Rao and

proceed to examine the contention of the petitioners on merits."

The Single Judge of the Hon'ble Andhra Pradesh High Court in ***B. Gowra Reddy (deceased by L.Rs.) and others v. Government of Andhra Pradesh and others, AIR 2002 Andhra Pradesh 313*** has held as under:-

"If this is construed as the report of the Survey Commissioner, then the purpose of incorporation of Section 4 of the Act is frustrated. It is only a form prescribed for registering a Wakf. But what is required to be done by the Survey Commissioner is not to enter the Wakf as such and he is bound to enquire whether the property is a Wakf property or not. He is also empowered to conduct the enquiry as was observed by the Supreme Court in the decisions referred to above. Mere filling of columns would not amount to report of the Survey Commissioner so as to bind the petitioners. Moreover, it is not in dispute that no notice was ever given to the occupants, who were recorded as such in the revenue register. Admittedly, the report was of 1967 by which time the petitioners were not the purchasers. They came into picture at a later point of time. But even then the enquiry ought to project as to the notice having been given to the persons. Even according to the reports submitted by the Deputy Tahsildar and also the remarks made by the Survey Commissioner one Lakshmaiah was in actual cultivation, but according to the Deputy Commissioner Laxmaiah was in illegal occupation. Be that as it may, a notice was necessary to be given to the person who is in occupation. But, there is no such record forthcoming as to what type of notice was issued to the parties and what type of enquiry was conducted. The report of the Deputy Tahsildar cannot be construed as an enquiry report or the pro forma for the survey of Wakf properties can be treated as a report of the Survey Commissioner. The

report as such has to conform to the requirements of Section 4 of the Act as has been held by the Supreme Court in the catena of decisions referred to above. It is also noticed from the counter that the subject matter of the property was endowed by the owner of the land and one Abbas Ali Khan into the Wakf Board in the year 1968 and the same was included in the list of wakf properties and the same was published in the Gazette dated 9-2-1989 along with other properties endowed by the same person. If this is to be accepted, it has to be held that the Wakf was registered for the first time in 1968 and there could not have been any report of the Wakf Commissioner in 1967. Further the requirements under Section 25 of the Wakf Act 1954 have to be complied with. There is not even an iota of proof of dedication by Abbas Ali Khan nor is there any Wakf deed. It is very much doubtful whether Abbas Ali Khan was alive in 1968 as can be seen from the Judgment of II Additional City Civil Court in O.S. No.368/69, dated 31-3-1982 filed by one Abdul Qavi against Laxmaiah and others. When such statutory requirements are not followed, the further question that falls for consideration is whether still the petitioners are required to approach the appropriate Tribunal or they can agitate under Article 226 of the Constitution of India.

It is true that under Section 83 of the Act any dispute arising out of Wakf properties can be agitated only before the Tribunal constituted under the Act. But, in the instant cases, the very principal requirement of notice and conducting enquiry as envisaged under the Act are lacking. Therefore, the question of driving the petitioners to the Tribunal would not arise. Admittedly, the petitioners have made out their occupation rights from Mr. Rangaiah's possession and thereafter Mr. Lakshmaiah and they have purchased the land under registered sale deeds and that too after obtaining appropriate permission from the Competent Authority

and it is also one of the contentions of the petitioners that they have acquired title by adverse possession. But, I am not inclined to adjudicate the same inasmuch as I am only concerned with the validity of the notification published in the Gazette on 9-2-1989. The decision referred to by the learned counsel for Wakf Board that the petitioner have to approach the Tribunal or the Civil Court, as the case may be, even after the expiry of one year period after the publication of Gazette notification is not applicable to the present cases, as that situation would not arise inasmuch as when the notice itself is lacking and no purpose will be served by approaching the Tribunal or Civil Court. It is also to be noted that the report of the Survey Commissioner sent by the Government to the Wakf Board has no automatic acceptance. It is required to examine such report before publishing the list. This statutory obligation is also totally lacking in this case. When the violation of statutory provisions is made out, it is always open to the parties to approach this Court under Article 226 of the Constitution of India. Admittedly, as can be seen from various documents filed by both the parties in these matters, nothing has been established to sustain the contention that the enquiry was conducted as required under Section 4(3) of the Act. In such a situation, it cannot be said that the impugned Notification is binding on the petitioners and accordingly, the petitioners are entitled to challenge the same as it is illegal and not enforceable as far as the petitioners are concerned. Accordingly, I have to reject the contention raised on behalf of the Wakf Board and also the Government in this regard.

It is also to be noted in this regard that though the Wakf Board has been contending that the property in question is a Wakf property, which was notified in the Official Gazette as early as in 1989, but it is surprising to note that till today no action has been initiated either for

evicting the petitioners or for recovery of possession of the Wakf property and no proceedings were initiated before the Tribunal constituted under the Act. None of the revenue records even whisper about the property as belonging to Wakf Board. It appears that the Wakf Board has filed an appeal only against the order of granting occupancy rights to the petitioners, and that too after one and half decades which is pending before the appellate authority on which I am not inclined to make any comments. Under these circumstances, I have to necessarily hold that the notification published by the Wakf Board in the Gazette on 9-2-1989 is not valid and the same is not binding on the petitioners. Accordingly, it is set aside as far as the petitioners are concerned. So far as the relief for quashing the proceedings pending before the appellate authority under the Inams Abolition Act is concerned, I am not inclined to do so. It is open for the parties to agitate their respective rights before the appropriate authority."

Mr. Bawa had strenuously argued that the Court cannot go into the disputed questions of fact and the parties are required to be relegated to the civil remedy available under the law.

There are no disputed questions of fact involved in this petition as submitted by Mr. R.K. Bawa. The question requiring consideration of the Court is whether the notice issued to the petitioner on 16.9.2000 was without jurisdiction or not. Secondly, whether without complying with the principles of natural justice, Annexure P-N could be issued or not. These issues do not require leading of any evidence by the parties and can be adjudicated upon in this petition without relegating the parties to approach the Civil Court.

The Hon'ble Supreme Court has held in ***Smt. Gunwant Kaur and others Vs. Municipal Committee, Bhatinda and others, 1969***

(3) SCC 769 that the High Court is not deprived of its jurisdiction to entertain the petition under Article 226 of the Constitution of India merely because in considering the petitioner's right of relief, questions of fact may fail to be determined**.** The Hon'ble Supreme Court has held as under:

> **"The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fan to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a -writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons. "**

Similarly, the Hon'ble Supreme Court has held in ***Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and others, (1974) 2 SCC 706*** that the writ petition under Article 226 is essentially different

from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit in the proceedings of petition under Article 226 of the Constitution of India. It has further been held that the High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right of relief, questions of fact may fail to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raised complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition.

In the latest judgment reported ***ABL International Ltd. and another Vs. Export Credit Guarantee Corporation of India Ltd. and other, (2004) 3 SCC 553*** the Hon'ble Supreme Court has held that in an appropriate case the writ court has jurisdiction to entertain a writ petition involving disputed question of facts. There is absolutely no bar in regard thereto. The Hon'ble Supreme Court has held as under:

> **"A perusal of this judgment shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Gunwant Kaur v. Municipal Committee, Bhatina where dealing with such a situation of disputed**

questions of fact in a writ petition this Court held: (SCC p. 774, paras 14-16)

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."

The above judgment of Gunwant Kaur finds support from another judgment of this Court in the case of Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council wherein this Court held: (SCC p. 587, para 13)

> **"Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary."**

This observation of the Court was made while negating a contention advanced on behalf of the respondent Municipality which contended that the petition filed by the appellant Company therein apparently raised questions of fact which argument of the Municipality wag; accepted by the High Court holding that such disputed questions of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise.

Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the

case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

It has been specifically stated by respondents No.1 to 4 in the reply that as per note dated 22.3.1951 in Khasra Paimaish, the property comprised in Khasra No.411 measuring 1395 sq. feet is owned by "Sarkar Dalut Mandar". The Wakf Act, 1954 had come into force in the year 1954 and in that year the property in question was never a wakf property. Similarly, when the 1995 Act had come into force, the property was not a wakf property since the property must be "existing wakf property" on the date of commencement of the Act so as to entitle the Wakf Board to exercise power over the same. This question has been considered by the Hon'ble Supreme Court in ***Karnataka Board of Wakf Versus Government of India and Others, (2004) 10 SCC 779*** as under:-

"Pertaining to the ownership claim of the appellants over the suit property there is no concrete evidence on record. The contention of the appellants that one Arabian saint Mahabari Khandayat came to India and built the Mosque and his lineal descendants possessed the property, cannot be accepted if it is not substantiated by evidence and records. As far as a title suit of civil nature is concerned, there is no room for historical facts and claims. Reliance on borderline historical facts will lead to erroneous conclusions. The

question for resolution herein is the factum of ownership, possession and title over the suit property. Only admissible evidence and records could be of assistance to prove this. On the other hand, the respondent produced the relevant copy of the Register of Ancient Protected Monuments maintained by the Executive Engineer in charge of the ancient monuments (Ext. P-1) wherein the suit property is mentioned and the Government is referred to as the owner. Since the manner of acquisition is not under challenge, the entry in the Register of Ancient Protected Monuments could be treated as a valid proof for their case regarding the acquisition of suit property under the appropriate provisions of the Ancient Monuments Act. Gaining of possession could be either by acquisition or by assuming guardianship as provided under Section 4 thereof. Relevant extracts of Ext. P-2, CTS records fortify their case. It shows that the property stands in the name of the respondent. Moreover, the evidence of Syed Abdul Nabi who is the power-of-attorney holder (of Defendants 2-A and 2-B in the original suit) shows that the suit property has been declared as a protected monument and there is a signboard to this effect on the suit property. He also deposed that the Government is in possession of the suit property and the Government at its expenditure constructed the present building in the suit property. On a conjoint analysis of Exts. P-1, P-2 and deposition of Syed Abdul Nabi, it could be safely concluded that the respondent is in absolute ownership and continuous possession of the suit property for the last about one century. Their title is valid. The suit property is government property and not of a wakf character.

The old Wakf Act is enacted "for the better administration and supervision of wakfs". Under Section 4 of the old Wakf Act, Survey Commissioner(s) could only make a "… survey of wakf properties existing

in the State at the date of the commencement of this Act". The Wakf Board could exercise its rights only over existing wakf properties. Since the suit property itself is not an existing wakf property the appellant cannot exercise any right over the same. Therefore, all the subsequent deeds based on the presumption that the suit property is a wakf property are of no consequence in law. The notification bearing No. KTW/531/ASR-74/7490 dated 21-4-1976, issued by the appellant and the Karnataka Gazette Notification, p. 608/Part VI dated 8-7-1976 is null and void. The same is liable to be deleted. In view of this, the aspects relating to treating gazette notification as notice and limitation need not be looked into. As regards the compliance with notice under Section 56 of the old Wakf Act, the High Court based on evidence and facts ruled that the same is complied with. This is a finding of fact based on evidence."

Since the property in question itself is not an existing wakf property, the Board could not exercise any right over the same. On this ground also, the decision of the Board to include the property of the petitioners as wakf property is bad in law.

The petitioners were required to be issued notice before effecting changes in the revenue record. Admittedly, no notice has been issued to the petitioners before effecting changes in the revenue record by respondent No.3.

In sequel to order dated 31.5.2007, Mr. R.K. Bawa, Senior Advocate had produced the record which was minutely perused by the Court.

The upshot of the above discussion is that (i) the petitioners' Predecessor-in-interest had purchased the land at a public auction on 7.4.1954 and the sale certificate was issued under the Evacuee

(Separation) Act, 1951, (ii) the Predecessor-in-interest of the petitioners have been paying the taxes to the Municipal Committee, Shimla, (iii) the notice issued by respondent No.3 to the petitioners on 16.9.2000 was without jurisdiction, (iv) the properties in question were never included in the list of wakf properties as per section 4 of the Wakf Act, 1954 or Wakf Act, 1995, (v) no notice was issued to the petitioners before the issuance of Gazette notification dated 9th March, 2002, (vi) the revenue entries could not be changed on the basis of Annexure P-N which is a nullity in the eyes of law. The writ petition is maintainable before this Court and the petitioners cannot be relegated to seek remedy under Section 83 of the Wakf Act, 1995.

Accordingly, this petition is allowed. Annexure P-N, dated 9th March, 2002 is quashed and set aside. The revenue entries made in favour of the Board by the respondent No.3 are also consequently quashed and set aside. No order as to costs.

(Rajiv Sharma)
Judge

July 23, 2007.
(sck).